NO. 81857-6

SUPREME COURT OF THE STATE OF WASHINGTON

COMMUNITY CARE COALITION OF WASHINGTON; HOME CARE OF WASHINGTON, INC.; THE FREDRICKSON HOME; CYNTHIA O'NEILL, a Washington Citizen and Taxpayer; RON RALPH and LOIS RALPH, husband and wife and Washington Citizens and Taxpayers,

Petitioners,

v.

SAM REED, Secretary of State,

Respondent,

and

LINDA LEE and PEOPLE FOR SAFE QUALITY CARE,

Interveners/Respondents.

BRIEF OF PETITIONERS (CORRECTED)

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I. INTRODUCTION

This case involves a decision by Secretary of State Sam Reed to process a petition for Initiative 1029 as an initiative to the people despite the fact the voters signed a petition that unequivocally stated it is an initiative to the legislature. This original action filed under article IV, section 4 of the Washington Constitution for a writ of mandamus or prohibition, or in the alternative certiorari, seeks to prohibit the Secretary of State from ignoring the directions on the face of the petition and certifying the measure to the general election ballot based on his own subjective evaluation of what the voters might have intended. This case presents an important and straightforward issue regarding how the intent of the voters is to be discerned. Is such intent to be discerned from the language of the petition the voters signed or by the Secretary of State's belief about the voters' intentions without regard to the unequivocal language of the petition? To allow the personal views and beliefs of the Secretary of State to override the clear directions of the voters on the face of the petition violates mandatory provisions of Washington laws enacted to guard against fraud or mistake in the exercise of initiative rights. The Secretary of State should be directed to transmit the petition and I-1029 to the legislature exactly as the voters who signed the petitions directed.

II. STATEMENT OF ISSUES PRESENTED

1. Whether RCW 29A.72.120 creates a legal duty for the Secretary of State to refrain from certifying a measure to the county auditors to be voted upon at the next general election when the petition

nowhere states it is an initiative petition to the people and instead affirmatively states it is an initiative petition to the legislature.

2. Whether RCW 29A.72.110, .170 and .230 create a legal duty for the Secretary of State to follow the unambiguous direction on the face of a petition that directs the Secretary to transmit the petition and the proposed initiative measure to the legislature.

3. Whether the Secretary of State has acted beyond the scope of his discretionary authority and contrary to law or in an arbitrary and capricious manner in processing and certifying an initiative petition as an initiative to the people when the petition nowhere states it is an initiative to the people and affirmatively states it is an initiative to the legislature.

4. Whether the Supreme Court should exercise its original or discretionary jurisdiction to determine these fundamental issues regarding the exercise of the initiative power under Article II, section 1(a) of the Washington Constitution.

III. STATEMENT OF THE CASE

A. Statement of Facts

1. Overview.

Over the last year legislators and concerned parties, including petitioners and interveners herein, have participated in legislative studies and proposals focused on training and certification of long-term care workers. Long-term care workers provide care services to elderly and clients with disabilities, many of whom receive publicly-funded services

through the Department of Social and Health Services' (DSHS) Aging and Adult Services and Developmental Disabilities programs. These workers provide their clients personal care assistance with various tasks such as bathing, eating, dressing, ambulating, meal preparation, and household chores. Long-term care workers are currently required to receive training through DSHS, and are subject to continuing education requirements and competency testing.

During the 2008 legislative session there was general support for additional registration and training requirements for long-term care workers. However, many different views were expressed on the efficacy of specific proposals and how the availability and affordability of care would be affected. There was also debate about the impacts of various proposals on parents who care for their children with developmental disabilities. See House Bill Report, ESHB 2693 and Senate Bill Report ESHB 2693.[1] In the 2008 legislative session the House and the Senate each passed a different version of House Bill (HB) 2693, "AN ACT Relating to required basic training and certification of long-term care workers." However, the House did not take up the issue of concurrence in the Senate amendments before the end of the session. *See* Bill Information HB 2693 2007-08.[2]

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[1]Links to these documents are available on Legislature's website at: http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2693&year=2007

[2] Available at: http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2693&year=2007.

During this same time period, over the past eight months, several proposed initiative measures on the subject of long-term care services were filed by sponsors associated with the interveners. These initiative measures have included two measures the sponsor indicated were initiatives to the legislature and five measures the sponsor indicated were initiatives to the people. The latter measures included I-1029.

While the text of a proposed initiative measure is filed with the Secretary of State, along with a form indicating the type of initiative proposed, the petitions that are presented to voters for signature are not filed and are available only as printed and circulated by the sponsor and proponents. On June 25, 2008, shortly before signed petition sheets were filed for I-1029, the Secretary of State learned that the petitions did not state they were for an initiative to the people. Rather, they stated the petition was for an initiative to the legislature and nowhere mentioned an initiative to the people. Declaration of Narda Pierce in Support of Request for Judicial Notice ("Pierce Decl."), Ex. J. That same day the Secretary of State's office announced it would accept the petitions as petitions for an initiative to the people. Motion for Accelerated Review, Attachment C. Petitioners learned through the media of the language on the petition stating the measure was an initiative to the legislature, and of the Secretary's intention to accept the petitions as an initiative to the people despite the language on the petition. After the Secretary of State declined to reconsider his decision, petitioners filed this original action.

2. Identity of the parties.

Petitioners are individuals and operators of facilities or services that provide care to the elderly and persons with disabilities. They include non-profit operators of elder care and assisted living facilities, agencies that deliver in-home care to elderly persons and persons with disabilities, adult family home operators, small businesses that deliver care, an individual who works in home care, and parents of an adult child with disabilities. In the 2008 legislative session, petitioners actively participated in the analysis, discussions, and drafting process associated with several measures that were introduced regarding training for long-term care service providers. Petitioner Community Care Coalition of Washington ("CCCW") was organized in May 2008 as a nonprofit organization registered with the Public Disclosure Commission as a Ballot Committee and includes a broad spectrum of care providers. Agreed Statement of Facts ("ASF"), p. 8, ¶ 21. Petitioner Home Care of Washington, Inc. provides care to approximately 1,200 elderly persons and persons with disabilities through its eleven office locations in eastern Washington. ASF, pp. 8-9, ¶22. Petitioner Fredrickson Home is an adult family home licensed by the State of Washington for six residents. It has a special designation from DSHS allowing it to provide residential care to persons with developmental disabilities and all of its residents receive funding through Medicaid. The Fredrickson Home's caregivers have education and experience in disabilities to provide residents the 24-hour support they require. The Home has a lengthy multi-year waiting list for

its services. ASF, p. 9, ¶23. Petitioner Cynthia O'Neill is a voter and taxpayer who works for a home care agency licensed with DSHS and contracted with its Division of Developmental Disabilities. She has spent her career providing care and oversight for persons with developmental disabilities. ASF, p. 9, ¶24. Petitioners Ron Ralph and Lois Ralph are parents of a 26-year-old son with severe developmental disabilities that require 24-hour, 7-days-a-week care. ASF, p. 10, ¶25. Each of these petitioners has a direct interest in the deliberative legislative process that accompanies an initiative to the legislature and in particular the legislature's ability to consider alternative approaches to the measure proposed. Petitioners Ralph have a particular interest in the legislature's deliberation of alternative approaches that would allow close relatives in addition to parents to provide care without undergoing the full certification that I-1029 would require. *See* ASF, p. 3, ¶7, Exhibit G. As taxpayers, petitioners also have an interest in the public funds expended on placing an initiative measure on a general election ballot and the vote canvassed when such measure is directed to the legislature, and in the fiscal impact on state taxpayers. Petitioners also have an interest in the impact on persons who pay privately for their care if I-1029 is implemented as law.

Respondent Secretary of State Sam Reed is the chief elections officer for the state of Washington, with statutory responsibilities and authority relating to initiatives, as prescribed by law. ASF, p. 10, ¶26. Respondent accepted and filed I-1029 as an initiative to the people and his Office has completed the process of checking and validating signatures on

those petitions. Respondent has determined that the petitions supporting I-1029 contain the valid signatures of legal voters and has provisionally certified I-1029 to the county auditors for inclusion on the November 4, 2008, general election ballot. ASF, p. 10, ¶27. *See* http://www.secstate.wa.gov/office/osos_news.aspx?i=r7lamsOurjpc5Todu z0u8w%3d%3d.

Interveners include I-1029's sponsor, Linda Lee, and the official ballot committee for I-1029, People for Safe Quality Care. ASF, pp. 10-11, ¶¶28, 29. People for Safe Quality Care include proponents of the initiative who were active in the 2008 legislative efforts to pass several bills associated with the care of elderly persons and persons with disabilities. *See* ASF, p. 11, ¶29. In addition to filing I-1029, Interveners filed several other initiative measures with the Secretary of State, including both initiatives to the people and initiatives to the legislature, that contained provisions similar to those set forth in I-1029. Petitioners have submitted signed petitions only for I-1029. *See* ASF, pp. 4-5, ¶10, Exhibit K. Pierce Decl., Exs. B-H.

3. Interveners' initiative filings that preceded Initiative 1029.

The substantive measure that is encompassed in I-1029 was initially filed, with minor variations, as a proposed initiative to the legislature by Charissa Raynor, a voter listing her address as 33615 1st Way South, Federal Way, the address of Service Employees International Union Local 775 (SEIU). Pierce Decl., Ex. B. The Secretary of State

forwarded the measure to the Office of the Code Reviser ("Code Reviser") for a Certificate of Review which was issued on December 10, 2007. Pierce Decl., Ex. C. The sponsor filed a revised copy of the proposed initiative to the legislature and it was assigned serial number 405 ("I-405") and forwarded to the Attorney General for a ballot title. The Attorney General supplied a ballot title which stated "Initiative Measure No. 405 concerns long-term care services for the elderly and persons with disabilities" and "[t]his measure would require certification for long-term care workers, including adult day care, hired after January 1, 2009, based on new testing and disciplinary standards, increased training standards, and additional criminal background checks." Pierce Decl., Ex. D. The ballot title and ballot measure summary were posted on the Secretary of State's website. The sponsor of I-405 did not submit signed petitions for this measure.[3]

The same voter, Charissa Raynor, filed another initiative measure to the legislature that, with minor variations, was the same as I-405 and I-1029. The sponsor described the subject of the proposed measure as "long-term care services" and checked the box indicating this measure was also to the legislature. Pierce Decl., Ex. E. After review by the Code Reviser the measure was assigned serial number 406 ("I-406"). The Attorney General provided a ballot title and ballot measure summary for this measure that was, with a minor deviation, the same as for I-405.

[3] *See* http://www.secstate.wa.gov/elections/initiatives/legislature.aspx?y=2007.

Pierce Decl., Exs. F and G. This initiative to the legislature was also posted on the Secretary's website. The sponsor of I-406 did not submit signed petitions for this measure.[4]

On January 30, 2008, Linda S. Lee filed a proposed initiative measure again regarding "long-term care services," but checking the box for an initiative to the people. Pierce Decl., Ex. H. The sponsor listed as her address the same Federal Way address that Charissa Raynor had used in filing initiative measures 405 and 406 in December 2007. The Secretary of State noted the sponsor named on the affidavit was not a registered voter, did not reside at the address listed, and recommended that the measure be withdrawn. Pierce Decl., Ex. I. This measure did not receive a ballot title and summary, and was not assigned a serial number. Ms. Lee filed another initiative on February 11, 2008, again listing the SEIU address. The initiative was reviewed and assigned a number, as indicated in the ballot title: "Initiative Measure No. 1015 concerns long-term care workers for the elderly or persons with disabilities." The ballot measure summary mentions training, certification and federal criminal background checks. No signatures were submitted. ASF, Ex. K, p. 11. Then on February 27, 2008, Ms. Lee filed another initiative addressing these subjects, and given the ballot title "Initiative Measure No. 1021 concerns long-term care workers for the elderly or persons with

[4] *See* http://www.secstate.wa.gov/elections/initiatives/legislature.aspx?y=2007.

disabilities." Again, the SEIU address is listed for the sponsor. No signatures were filed. ASF, Ex. K, pp. 12 – 13.

4. Bills enacted and introduced during the 2007 and 2008 legislative sessions.

In May 2007, the legislature adopted E2SHB 2284, which increased the number of hours of training for long-term care workers beginning January 1, 2010. It further provided that for individual providers represented by an exclusive bargaining representative certain training must be provided by a training partnership maintained jointly by the Office of the Governor and the exclusive bargaining representative of the individual providers. This legislation also established a Work Group to evaluate existing training requirements for long-term care workers and make recommendations related to an appropriate number of basic training hours, the content of the training curricula, and the development of criteria associated with certification of new long-term care workers. The Work Group was required to report back to an existing Joint Legislative and Executive Task Force on Long-Term Care Financing and Chronic Care Management (Task Force), which was developing recommendations regarding various aspects of the long-term care system in Washington State including sustainable funding, cost containment, private options, the needs of rural and urban communities, and prevention and chronic care management. One area of study was the amount and type of training that

should be required for individual and agency home care workers. Final Bill Report, E2SHB 2284.[5]

The Task Force issued its Final Report in January 2008. The Final Report contained a section on training requirements for home care workers including proposed content for basic training and parameters for the appropriate number of basic training hours. As a result of these findings and recommendations, HB 2693 was introduced in the House Health and Wellness Committee in the 2008 session of the legislature. The bill was debated and versions passed by both the House and the Senate, but the legislation was on the House Concurrence Calendar and pending in the House Rules Committee on the last day of the legislative session, March 13, 2008.

5. The filing of proposed Initiative 1029, the Code Reviser Review, and the issuance of a ballot title and summary.

On March 12, 2008, the first day that initiatives to the legislature could be filed for the 2009 legislative session, Linda S. Lee filed another proposed initiative measure, completing the affidavit form by describing the subject as "long term care services" and checking the box indicating that the proposed initiative measure would be submitted to the "people." ASF, p. 2, ¶1, Ex. A. At the same time Ms. Lee filed a second apparently identical proposed initiative measure, again checking the box for an

[5] *See* http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House%20Final/2284-S2.FBR.pdf

initiative to the people. ASF, p. 2, ¶2, Exhibit C. The Secretary of State sent the proposed initiatives to the Code Reviser for review. *See* ASF, p. 3, ¶3, Exhibit D; p. 3, ¶4, Exhibit E. The sponsor subsequently filed the Certificate of Review and the sponsor's final version of one of the initiative measures with the Secretary of State on March 28, 2008. ASF, p. 3, ¶¶5, 6, Exhibit F. ASF, pp. 3-4, ¶7, Exhibit G. The Secretary of State's website indicates that the sponsor's second measure was not assigned a number and was "Inactive – Deadline Expired." ASF, pp. 4-5, ¶10, Exhibit K.

The Secretary of State assigned the first measure the number I-1029, from a statutorily-required separate series of numbers for initiative measures to the people. ASF, p. 4, ¶8, Exhibit H. The Attorney General drafted the Ballot Title for I-1029 and Ballot Measure Summary. ASF, pp. 4-5, ¶10, Exhibit J. The ballot title and ballot measure summary was, with minor exceptions, the same as for the proposed measures to the legislature, I-405 and I-406, that were filed on December 4, 2007. ASF, pp. 4-5, ¶10, Exhibit J; Pierce Decl., Exs. D and G.

On April 4, 2008, the Secretary of State sent the sponsor a letter advising the sponsor that the official ballot title and summary statement had to appear on the front of each signature petition sheet circulated, that sponsor should read chapter 29A.72 RCW regarding the requirements for petition layout and signature gathering, and that the Secretary of State's Office did not review initiatives for content but would "review the final proof copy of your petition sheet for matters of form and style should you

desire such consultation." ASF, p. 5, ¶11, Exhibit L. The sponsor did not accept the Secretary of State's offer to review the final proof copy of the I-1029 petitions that would be presented for voters' signatures

6. Circulation of petitions for voters' signatures and submission of signed petitions.

The sponsor and proponents of I-1029 prepared and circulated petitions for voters' signatures. The petitions were printed as single sheets of paper, measuring 22 inches by 17 inches, and folded to form a booklet measuring 11 inches by 17 inches. ASF, p. 5, ¶12, Exhibit M. On the first page of the petitions was the ballot title and ballot measure summary followed by the statement:

> *To the Honorable Sam Reed, Secretary of State of the State of Washington:*
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully *direct that this petition and the proposed measure known as Initiative Measure No. 1029 . . . be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure* into law; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

Id. (emphasis added). In addition to this statement, the petitions included the required warning that persons signing petitions with any name other than their own, signing more than one petition, or signing as an unregistered voter would be subject to fine or imprisonment. The page

then set out twenty lines for voters' signatures and addresses. Nothing on the petition form advised voters that I-1029 was other than an initiative to the legislature. *Id.*

On or about June 25, 2008, a citizen delivered to the Secretary of State's Office a copy of an I-1029 petition and pointed out that the language on the face of the petition did not meet the requirements set out in RCW 29A.72.120 for an initiative to the people. ASF, p. 5, ¶13. It is unknown whether the sponsors and proponents were aware of the deficiencies before the citizen delivered the petition to the Secretary of State. The proponents arranged with the Secretary of State's Office to submit signed I-1029 petitions for filing on July 3, 2008. Under the filing deadlines contained in RCW 29A.72.160, this was the last day that petitions for initiatives to the people could be filed with the Secretary of State. Signed petitions for initiatives to the legislature can be filed not less than ten days before the commencement of the session. Const. art. II, § 1(a).

On July 2, 2008, the CCCW sent the Secretary of State a letter regarding the I-1029 petitions the sponsor and proponents were scheduled to submit on July 3, 2008. In the letter, the CCCW stated that "nothing on the face of the petitions proposes a measure for submission to the people for their approval or rejection"; that "the persons signing the petitions placed their signature beneath a petition *to the legislature*"; and "[d]espite the clear law and the offer of technical assistance, the petitions that were circulated for signatures were not in substantial compliance with the law,

and must be rejected" as initiatives to the people. ASF, p. 6, ¶15, Exhibit N. On July 3, 2008, the I-1029 sponsor and proponents submitted their petitions to the Secretary of State for filing and certification to the voters for vote at the general election to be held on November 4, 2008. ASF, p. 6, ¶14. All of the petitions filed by the I-1029 sponsor and proponents included the same format and language indicating the measure was directed to the legislature.

The Secretary of State responded to CCCW's July 2, 2008, letter through its legal counsel on July 14, 2008. The Secretary of State's counsel advised CCCW that the I-1029 petitions would be processed as an initiative to the people and, if the signatures were verified and canvassed, the measure would be placed on the November 4, 2008, ballot. ASF, pp. 6-7, ¶17, Exhibit O. The Secretary of State verified and canvassed the I-1029 petitions and found sufficient signatures to certify the matter to the county auditors for placement of the matter on the November ballot.[6] Statutes require the Secretary of State to certify an initiative to the county election officials for the November general election ballot no later than September 9, 2008. ASF, p. 7, ¶18. The Secretary of State has stated that he will certify I-1029 to the various counties for placement of the measure on the November 4, 2008, general election ballot. *Id.*

On July 18, 2008, Cynthia O'Neill and other taxpayers and voters asked the Attorney General for the state of Washington to bring a taxpayer

[6]http://www.secstate.wa.gov/office/osos_news.aspx?i=r7lamsOurjpc5Toduz0u8w%3d%3d

suit to mandate the Secretary of State to accept, file, and certify I-1029 as an initiative to the legislature and to prohibit the Secretary of State from accepting, filing, and certifying I-1029 as an initiative to the people. ASF, pp. 7-8, ¶20, Exhibit P. On July 29, 2008, the Attorney General declined to bring such an action. ASF, pp. 8-9, ¶20, Exhibit Q.

B. Procedural Background

Petitioners filed this original action as a Petition Against State Officer Sam Reed, Writ of Mandamus, Writ of Prohibition, in the Alternative Writ of Certiorari on July 22, 2008. At the same time petitioners asked for accelerated review. On July 28, 2008, the initiative sponsor and proponents moved to intervene to defend the Secretary's decision to treat I-1029 as an initiative to the people, and petitioners agreed to this intervention. Interveners have indicated they plan to bring a motion to transfer or dismiss the case. The Secretary of State supported accelerated, pre-election review of this matter but indicated he intends to contest the Court's jurisdiction over the matter, citing *Schrempp v. Munro*, 116 Wn.2d 929, 809 P.2d 1381 (1991). Secretary of State's Response to Motion for Expedited Review of Petition Against State Officer at 11. The Supreme Court Commissioner issued a Ruling on Original Action on July 29, 2008, retaining the matter for decision by the Court with any motion to dismiss to be briefed and considered along with other arguments.

IV. ARGUMENT

A. Exercise of Original Jurisdiction Is Appropriate to Decide This Case

1. Mandamus is an appropriate remedy where the secretary of state has acted beyond the bounds of the discretion delegated to him.

The Washington Constitution confers original jurisdiction upon the Supreme Court in "mandamus as to all state officers." Const. art. IV, § 4. Mandamus will lie to compel a state officer to undertake a clear duty required by law. *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994).[7] Mandamus will not issue to control the exercise of discretion, but it will issue if an executive officer has acted beyond the bounds of the discretion that the legislature delegated to him. As the United States Supreme Court has long recognized, an official's discretionary duty "may be discretionary within limits," and he may be controlled by mandamus to keep within those limits. In *Work v. United States*, 267 U.S. 175, 177, 45 S. Ct. 252, 252, 69 L. Ed. 561 (1925), Chief Justice Taft observed:

> Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within

[7] The Court has in the past issued the writ of prohibition to compel state officials to refrain from certifying a proposed referendum for election. *See Andrews v. Munro*, 102 Wn.2d 761, 762, 689 P.2d 399 (1984). However, more recently this Court has identified mandamus as the appropriate remedy to compel the Secretary of State to refrain from taking unauthorized action with regard to ballot measures. *See Washington State Labor Council v. Reed,* 149 Wn.2d 48, 65 P.3d 1203 (2003).

> them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has.

Whether an action is within or without the scope of discretion is defined by relevant laws. "The extent [of discretion] and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose." *Id.* at 267 U.S. 175, 178, 45 S. Ct. 252, 253. These principles were recently summarized in *In re Freeman,* 489 F.3d 966, 968 (9th Cir. 2007):

> While mandamus may not be used to impinge upon an official's legitimate use of discretion, even in an area generally left to agency discretion, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated.

(Quoting *Barron v. Reich*, 13 F.3d 1370, 1376 (9th Cir. 1994).)

A review of the relevant laws here will show that a decision to place a measure on the general election ballot on the basis of a petition that contains no mention of an initiative to the people (and instead directs transmittal to the legislature) is beyond the legal limit of the discretion provided to the Secretary in chapter 29A.72 RCW. Even if aspects of the Secretary's decisions are discretionary, his discretion does not extend to waiving the essential elements of an initiative petition required by law. *See* pages 26-33 *infra.*

The Court is vested with a sound legal discretion to determine for itself whether a question presented is of such a character as to call for the exercise of its original jurisdiction in mandamus to a state official. *State*

ex rel. O'Connell v. Meyers, 51 Wn.2d 454, 459 - 60, 319 P.2d 828 (1958). "The primary factor to be considered, in determining whether this court should assume or refuse original jurisdiction in mandamus to a state official, is whether the sovereignty of the state, its franchises, prerogatives, or the rights and interests of the general public are involved." *Id.* at 459.

Such public interests are integral to the question of whether a ballot measure is properly placed before the voters at a general election. The importance of these interests is reflected in a number of cases where the Court has exercised its original jurisdiction to consider whether measures were authorized to be placed before the voters. *See, e.g., Wash. State Farm Bureau Fed'n v. Reed,* 154 Wn.2d 668, 683, 115 P.3d 301 (2005) and *Washington State Labor Council v. Reed,* 149 Wn.2d 48, 54-55, 65 P.3d 1203 (2003) (citing a number of previous occasions when the Court had exercised original jurisdiction to consider whether a ballot measure was authorized by article II, section 1).

2. Alternatively, a writ of certiorari is appropriate to determine whether the actions of the secretary are arbitrary and capricious or contrary to law.

Even if the Secretary's actions are within the scope of his discretion, this Court has the inherent power of review in the nature of certiorari. In addition to its original and appellate jurisdiction, this Court has the constitutional power "to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."

Const. art. IV, § 4. The constitutional writ of certiorari recognizes the courts' inherent discretionary authority to review administrative decisions for illegal or arbitrary and capricious acts. *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 304, 949 P.2d 370 (1998) (discussing the article IV, section 6 power of superior courts to issue writs of certiorari). In *North Bend Stage Line v. Dep't of Public Works*, 170 Wash. 217, 228, 16 P.2d 206 (1932) this Court observed it has the same discretionary jurisdiction to review executive actions through constitutional writs of certiorari as the superior courts:

> [W]e have seen that, under the Constitution, this court, as well as the superior court, has original certiorari jurisdiction. We have also seen that this court's certiorari jurisdiction is the common-law certiorari jurisdiction, and that the exercise of such jurisdiction is discretionary in the court possessing it, to which application is made to exercise it.

This inherent power may be exercised to determine whether decisionmakers have violated laws or rules that govern the exercise of discretion. *See Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983) (an agency's violation of the rules that govern its exercise of discretion is considered contrary to law and may be reviewed under constitutional writ of certiorari).

3. Statutes cannot and do not deprive this Court of its constitutional powers under article IV, section 4.

The interveners have argued that RCW 29A.72.180 and .190 prohibit the petitioners from challenging the Secretary of State's decision to file I-1029 as an initiative to the people.[8] Interveners' Opposition to Petitioners' Motion for Accelerated Review at 1. However, "the court's 'constitutional power of review cannot be abridged by legislative enactment.'" *Kreidler v. Eikenberry*, 111 Wn.2d 828, 835-836, 766 P.2d 438 (1989) (quoting *State ex rel. Cosmopolis Consol. Sch. Dist. 99 v. Bruno*, 59 Wn.2d 366, 369, 367 P.2d 995 (1962)). With respect to writs, as distinguished from appeals, article IV, section 4 is self-executing. *See Kreidler v. Eikenberry*, 111 Wn.2d at 36.

Indeed, the fact that there is no plain, speedy, or adequate remedy at law weighs in favor of the Court's exercise of its original and discretionary jurisdiction. A writ of mandamus is particularly warranted where there is no plain, speedy, and adequate remedy in the ordinary course of law. *Wash. State Farm Bureau Fed'n v. Reed,* 154 Wn.2d 668, 672, 115 P.3d 301, 303 (2005). Similarly, a constitutional writ of review is appropriate where there is no adequate remedy at law available. *Saldin Sec., Inc.,* 134 Wn.2d at 301 (Talmadge, J., concurring). The legislature

[8] The legislature provided no statutory procedure for review of the Secretary of State's decisions at issue in this proceeding. *See* RCW 29A.72.180 and .190 (providing only persons submitting an initiative petition for filing a right to apply to the superior court for a writ of mandate to compel the Secretary of State to file such petition, and allowing appeal only from refusal of the superior court to grant the writ of mandate); *Schrempp v. Munro*, 116 Wn.2d 929, 809 P.2d 1381 (1991) (statutes do not authorize opponents of initiative to challenge acceptance and filing of initiative).

has not provided statutory review procedures for the actions that are challenged here. Additionally, given the short time between the submittal of the signed petitions and the time constraints for ballot preparation, determination of the matter by a lower court followed by appellate review would be difficult if not impossible to achieve. *See* Declaration of Catherine S. Blinn, July 25, 2008, filed by respondent Secretary of State.

B. The Requirement That A Petition for an Initiative Must Be Substantially In the Required Form Is Mandatory and Safeguards the Proper Operation of the Initiative Process

The basic requirements and processes for the two forms of initiatives reserved to the people are established in article II, section 1(a) of the Washington Constitution. The constitution sets out the timing for the filing of initiatives to the people and to the legislature and the number of valid signatures of legal voters required to direct the matter to the ballot or legislature. *Id.* In addition the constitution specifies the variety of actions the legislature, and subsequently the voters, may take with regard to initiatives to the legislature.[9]

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[9] Article II, section 1(a) provides the following with respect to initiative measures certified to the legislature: "[They] shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election."

The constitution further provides that while its initiative provisions are self executing, "legislation may be enacted especially to facilitate its operation." Const. art. II, § 1(d). Shortly after Amendment 7 first provided the power of initiative in 1912, Washington's legislature enacted statutes to facilitate this new lawmaking power. These provisions are now set forth in chapter 29A.72 RCW. Notably, the first laws enacted to facilitate the initiative power included petition language similar to that now found in RCW 29A.72.110 and .120. *See* Laws of 1913, ch. 138, §§ 5 and 6.[10]

1. Chapter 29A.72 RCW is properly read as imposing a mandatory requirement that an initiative petition state on its face whether it is to the legislature or the people.

The legislature has set forth specific and separate provisions that direct petition sponsors as to the correct format and language required for initiative petitions submitted to voters for signatures. Petitions must be

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[10] For example, section 5 of the 1913 law provided in part: "Petitions for proposing measures for submission to the legislature at its next regular session, to be filed with the secretary of state not less than ten days before such regular session, shall be substantially in the following form: . . . .

[text of warning omitted]

INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE

To the Honorable ....., Secretary of State of the State of Washington:

We, the undersigned citizens of the State of Washington and legal voters of the respective precincts set opposite our names respectfully direct that this petition and that certain proposed measure known as Initiative Measure No. ...., and entitled (here set forth the established ballot title of the measure), a full, true and correct copy of which is hereto attached, shall be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we hereby respectfully petition the legislature to enact said proposed measure into law; . . .

"substantially" in the form that is set forth for the specific type of initiative proposed. Thus, the sponsor and proponents of an initiative are not left to guess as to the format or language to be used in an initiative provision, but rather are provided the entire form in the statutory provisions. *See* RCW 29A.72.110 (petitions for initiatives to the legislature), .120 (petitions for initiatives to the people), and .130 (petitions for referendums).

The form for a petition to the legislature is set forth in RCW 29A.72.110. It first requires the warning statement to voters regarding their signing of petitions with language as prescribed in RCW 29A.72.140. The warning must be followed by this language:

> INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE
>
> To the Honorable ....., Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully direct that this petition and the proposed measure known as Initiative Measure No. .... and entitled (here set forth the established ballot title of the measure), a full, true, and correct copy of which is printed on the reverse side of this petition, be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

RCW 29A.72.110 further requires the petition form to provide a place for each petitioner to sign and print his or her name, address, city, and county and the address, city, and county where that person is registered to vote.

Similarly, initiative petitions proposing measures for submission to the people must be "substantially" in the form set out in RCW 29A.72.120. That form first requires the warning prescribed by RCW 29A.72.140, and then the following language:

> INITIATIVE PETITION FOR SUBMISSION
> TO THE PEOPLE
>
> To the Honorable ....., Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully direct that the proposed measure known as Initiative Measure No. ...., entitled (here insert the established ballot title of the measure), a full, true and correct copy of which is printed on the reverse side of this petition, be submitted to the legal voters of the State of Washington for their approval or rejection at the general election to be held on the ..... day of November, (year); and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

Notably, both of these initiative forms have operative language where the voters signing the petitions direct the measure to the legislature or to the people. It is not the sponsor or proponents of the initiative that make this directive.

The obvious and central purpose of setting out two separate forms for the two initiative types, with the type of initiative prominently mentioned, is to provide clear disclosure to voters signing initiative petitions. Both RCW 29A.72.110 and .120 direct initiative petitions to be in substantial compliance with these forms. By providing the language for a petition, the legislature facilitated the operation of the initiative power for both the sponsors of initiatives and the voters presented with petitions. The legislature made it exceedingly easy for initiative sponsors to comply with RCW 29A.72.110 and .120. At the same time these provisions ensure proper notice to the voters asked to sign by requiring the petition to state on its face where the voters are directing the measure.

2. The Secretary's claim of unbounded discretion ignores clear statutory language and would render the mandatory language of RCW 29A.72.120 superfluous.

The Secretary has no discretion to refuse to transmit a certified copy of a proposed measure to the legislature where a petition clearly states it is directed to the legislature, in substantially in the form required by RCW 29A.72.110, and an adequate number of signatures has been verified and canvassed. *See* RCW 29A.72.230. A claim that the Secretary has the discretion to instead send the measure to the ballot when the petitions proposing the measure were demonstrably NOT substantially in the form required by RCW 29A.72.120 would violate basic precepts of statutory construction. The Secretary's claim of absolute discretion is contrary to the clear language of the statutes and would make the

mandatory language of RCW 29A.72.120 superfluous. RCW 29A.72.120 begins:

> Petitions for proposing measures for submission to the people for their approval or rejection at the next ensuing general election *must be substantially in the following form:*
>
> The warning prescribed by RCW 29A.72.140; followed by:
>
> INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE

(Emphasis added.) This language indicates a mandatory requirement that applies to the form of the petition. Use of the word "must" connotes a requirement that is mandatory and not subject to discretion. *See Kelleher v. Ephrata School Dist. 165,* 56 Wn.2d 866, 872, 355 P.2d 989 (1960) (holding "the only construction that gives [a claim filing statute] any meaning is that 'must' is mandatory, and that the claim which 'must' be presented is a prerequisite to maintaining an action").

For a petition to be "substantially in the following form," it must contain all the *essential* requirements of the form that is prescribed, without demanding exact compliance in every detail. In *Truly v. Heuft,* 138 Wn. App. 913, 922, 158 P.3d 1276 (2007), the court considered the essential features where the summons for an unlawful detainer action was required to be "substantially in the following form." The latitude of requiring it be substantially in the statutory form "does not mean that material sections of a statutory summons can be left out." *Id.* Similarly, "substantial compliance" has been defined as "actual compliance in

respect to the substance essential to every reasonable objective of [a] statute." *Weiss v. Glemp*, 127 Wn.2d 726, 731, 903 P.2d 455 (1995) (quoting *In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)).

Courts in other states that have construed the phrase "substantially in the following form" have also looked to whether adequate notice of essential requirements was included. *See, e.g., People ex rel. Darr v. Alton R. Co.,* 380 Ill. 380, 43 N.E.2d 964, 966 (1942) (interpreting "substantially in the following form" as meaning "the notice should, in the main, contain all the essential requirements of the form prescribed but that something less than exact compliance in every detail will be sufficient"). *See also Burks v. Kaiser Foundation Health Plan, Inc.,* 160 Cal.App.4th 1021, 1029, 73 Cal. Rptr.3d 257, 262 (2008) (substantial compliance with health care disclosure form means the substance essential to the objective of the statute, as distinguished from mere technical imperfections of form).

A petition that states it is an initiative to the legislature and nowhere states it is an initiative to the people can never be deemed a mere technical imperfection of form. The legislature determined the knowing exercise of the initiative right by persons asked to sign required notice of the type of initiative be displayed on the face of the petition. Since 1913 the law has required that an initiative to the people be substantially in the form set forth in RCW 29A.72.120. This law facilitates the operation of the initiative and avoids technical provisions or constructions while still including requirements necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right. *See State v.*

Superior Court for Thurston County, 81 Wash. 623, 632, 143 P. 461 (1914). The right of initiative the legislature facilitates is not just the right of the person who proposes the initiative, but also the rights of all the persons who are asked to sign the petitions. *See State v. Superior Court for Thurston County,* 97 Wash. 569, 574-576, 166 P. 1126 (1917).

This essential requirement of notice continues to be a central feature of the Washington law. In chapter 29A.72 RCW, the legislature specifies different forms, and includes different language on those forms, for initiative petitions to the legislature and to the people. *Compare* RCW 29A.72.110 and RCW 29A.72.120. While the Secretary of State treats the language differences as insignificant, that treatment belies the plain language of these two statutory provisions. The language in RCW 29A.72.110 directing initiatives to the legislature is unambiguous, as is the directive that petitions to the legislature must be "substantially" in that form. Likewise, the language of RCW 29A.72.120 for initiative petitions to the people is unambiguous as is the mandate that such petitions comply with that language. To accept the Secretary of State's position will require this Court to create an ambiguity in clear statutory language where none exists, and to treat the mandatory language as superfluous. Where a statute is clear on its face, its meaning must be derived from the language of that statute alone. *Densley v. Dep't of Retirement Systems*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) ("[c]ourts should assume the Legislature means exactly what it says in a statute and apply it as written") (internal quotation and citations omitted). Additionally, when different language is

used in different sections of a statute, it must be assumed that the legislature intends that language to have different meanings. *Id.* And, under the rules of statutory interpretation, giving effect to a document that is not "substantially in the [required] form" renders this language in a statute superfluous. *See Truly v. Heuft,* 138 Wn. App. at 915.

3. The distinction between an initiative to the legislature and an initiative to the people is fundamental.

Initiative sponsors and proponents are required to articulate in the petition which type of the initiative is being presented to the voters for their signatures. This is fundamental because it is the voters that are signing the initiatives that direct which path the measure is to take. *See, e.g.,* RCW 29A.72.110 ("the undersigned citizens and legal voters of the State of Washington respectfully direct that this petition and the proposed measure . . . be transmitted to the legislature of the State of Washington at its next ensuing regular session . . ."). An initiative directed to the legislature fundamentally differs from an initiative to the people.

Giving effect to the operative language of an initiative petition respects, and does not deny, the voters' franchise and the right of petition. An initiative to the people and an initiative to the legislature have very different processes and consequences. If passed, an initiative to the people will change existing law without further review and the legislature will be restricted in amending the law for a period of two years. An initiative to the legislature is a more conservative exercise of the people's lawmaking

power that calls for legislative deliberations and future options for the voters.

An initiative to the legislature is not placed immediately on the ballot. Rather, the legislature may propose an alternative, enact the initiative into law, or reject (or fail to act upon) the proposal. If the legislature proposes an alternative, then both the initiative and the alternative are placed before the voters. If the legislature enacts the measure into law, the voters may file a referendum petition on all or any part of the law. If the legislature fails or refuses to enact the initiative into law, the initiative is placed on the next general election ballot. Thus, the initiative to the legislature gives the voters choices not afforded voters in an initiative to the people. To ignore these basic and constitutional differences in the two forms of initiative would underrate the voters of this State and their understanding of the options for the exercise of direct democracy.

C. This Court Enforces Basic Procedural Requirements That Guard Against the Misleading or Confusing Exercise of Lawmaking Power, Whether by Legislators or by Citizens

1. The integrity of the initiative process requires an objective evaluation of the petition to determine whether it contains essential notice of the nature of the petition.

Although the Secretary of State is treating I-1029 petitions as petitions for an initiative to the people, an objective analysis of those petitions readily shows they do not substantially comply with that format.

The plain language on the face of the I-1029 petitions does not advise voters signing the petitions that they are directing the proposed measure to the people for a vote at the November 2008 general election. Rather, those voters placed their signatures two inches below language that unequivocally states they are directing the measure to the legislature. Nowhere on the face of the petitions or succeeding pages is there the slightest indication that the measure is to be directed to the people for a direct vote. In fact, the only way a signing voter would know that the sponsor and proponents intended I-1029 to be submitted to the people would be if the voters viewed the Secretary of State's files before signing the petition.

The I-1029 record retained by the Secretary of State contains (1) the sponsor's affidavit with the box checked indicating the initiative measure is to the people, and (2) a small number of transmittal letters and letters to the sponsor stating the initiative measure is to the people. The Secretary of State also has a website list of initiatives under a heading "to the people" that includes I-1029.[11] The Secretary of State nevertheless apparently assumes that all the voters who signed I-1029 petitions looked at the Secretary of State's I-1029 file or website, understood the petitions contained the wrong directive language, and that the measure was actually

[11] The Secretary of State's file for I-1029 does not include a sample I-1029 petition. While the sponsor and proponents could have submitted an I-1029 petition for review, as offered by the Secretary of State, the sponsor and proponents declined this invitation. Thus, the Secretary of State would not have known that I-1029's sponsor and proponents were circulating the wrong form.

to be submitted to the people. No objective, reasonable voter would have followed this scenario. It is far more believable that voters read the language on the I-1029 petitions and understood that their signature would direct the measure to the legislature.

Moreover, what is contained in the Secretary of State's file and on its website regarding I-1029 has nothing to do with whether the initiative substantially meets the unambiguous requirements imposed by RCW 29A.72.110 for a *petition form* that is proposing to direct a measure to the people. Substantial compliance with those requirements is mandatory. There is no exception that places the sponsor's affidavit, with the box checked for an initiative to the people, above this requirement. Moreover, RCW 29A.72.010 only requires "an affidavit that the sponsor is a legal voter" and provides no further legal significance to the affidavit.

At a minimum, an initiative petition must allow a voter to understand what it is (s)he is being asked to sign. It would compromise the integrity of the initiative process if the Secretary of State were allowed to simply substitute one initiative path with the other in total disregard of what the filed petitions state. Sponsors and proponents of initiatives unable to submit the required number of signatures on the petitions by the July 3, 2008, deadline for an initiative to the people could simply continue collecting signatures until the next legislative session and claim the petitions were simply in error. *See* Const. art. II, § 1(a). In essence, savvy initiative proponents would engage in a "bait and switch" that would give signature collection a wholly uncontemplated flexibility in initiative

language and signature collection timelines. The integrity of the initiative process cannot sustain such unfettered discretion by the Secretary of State. The Secretary's "discretion" is not so broad as to allow him to decide which of two initiative paths a measure should take when a discrepancy exists between the checked box on an affidavit and the plain language contained on the face of the petitions signed by voters. Granting the Secretary of State such discretion would seriously erode the initiative process.

2. Examining the text of the initiative petition to determine if it contains the essential element of notice is consistent with judicial review of other notice requirements in the legislative process.

This Court has consistently looked to the text and titles of proposed laws in determining whether basic elements of notice required in the legislative process have been provided to legislators or citizens exercising their lawmaking power. The Court has declined to substitute a general requirement that notice "be somehow available to voters." *See Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 155, 171 P.3d 486 (2007). The same objective textual approach is warranted with regard to the requirement that a petition for an initiative state on its face whether the initiative is directed to the people or to the legislature.

The basic notice required by RCW 29A.72.110 and .120 may be analogized to the "subject-in-title" requirement of article II, section 19 of the Washington Constitution. Article II, section 19 requires the title to provide notice of the bill's objective so as to protect legislators and the

people acting in their legislative capacity against undisclosed subjects in bills. *See* Kristen L. Fraser, Method, *Procedure, Means, and Manner: Washington's Law of Law-Making,* 39 Gonz. L. Rev. 447, 478 (2003-2004). A court will examine the language used in the ballot title and compare it with the initiative measure text to determine whether this subject-in-title requirement is met. *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 632, 71 P.3d 644 (2003). A title complies with this requirement if it gives notice to voters which would indicate the scope and purpose of the law to an inquiring mind. *Id.* at 639. A ballot title of an initiative that omits essential matters or misrepresents an initiative's actual provisions "can mislead a substantial number of people into signing it." *State v. Broadaway*, 133 Wn.2d 118, 125, 942 P.2d 363 (1997). In its review the court does not speculate whether legislators or voters were actually misled by the failure of the title to mention the subject, and does not conduct a poll of the legislature or the people to determine if the "hidden subject" would have changed their decisions. Rather, the court requires compliance with the requirement that the measure itself provide the notice, a requirement that is not onerous and adherence to which prevents the opportunity for fraud and mistake. When this constitutional mandate of subject-in-title is violated, the courts will not hesitate to declare the legislative actions void. *Patrice v. Murphy*, 136 Wn.2d 845, 851-52, 966 P.2d 1271 (1998) (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 24, 200 P.2d 467 (1948)).

In a similar manner, the Court examines the actual text of an initiative that amends existing law to determine if the notice requirements of article II, section 37 of the Washington Constitution are met. This section requires "the act revised or the section amended shall be set forth at full length" in order that legislators or the people acting in their legislative capacity would have notice of the changes made by the amendatory bill. *Washington Citizens Action of Washington v. State*, 162 Wn.2d at 155. In that case, the Court observed: "While complete review of the attorney general's explanatory statement in the Voters' Pamphlet might have explained the relationship between pre-I-722 law and the changes proposed by I-747, article II, section 37 does not simply require that notice of an amendatory initiative's impact on existing law be somehow available to voters . . . Nothing in the plain language of article II, section 37 or in our case law interpreting it suggests that information in the Voters' Pamphlet can cure the type of textual violation of article II, section 37 that occurred here, where the initiative's inaccuracy strikes at the substance of the amendment's impact." *Id.* The Court looked to what the voter would understand by reading the text of the initiative: "Here, if a voter simply read the text of the initiative, he or she would have understood that I-747 reduced the property tax levy limit from two percent to one percent. Simply put, a voter reading the text of the initiative would have perceived a much smaller impact on government coffers than would actually occur under I-747 . . . The text of the initiative misled voters about the substantive impact of the initiative on existing law." *Id.* at 156.

There is no reason to depart from this textual approach and allow speculation as to what other sources voters might have consulted or what understanding they may have had despite the clear language of the initiative petition.

3. Without this most basic notice requirement, the intentions of the signers can only be determined by speculation.

The Washington courts have not had occasion to directly address whether an initiative that states on its face the measure is directed to the legislature can be construed as an initiative to the people based on the affidavit and representations of the sponsor and proponents. The courts have, however, treated such procedural error challenges differently than substantive provision reviews and allowed such procedural deficiencies to be challenged in pre-election actions. *See Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). This is because, as the court reflected in *Coppernoll*, the initiative is "widely revered as a powerful check and balance on the other branches of government" and that "this potent vestige of our progressive era past must be vigilantly protected by our courts." *Id.* at 297, *citing In re Estate of Thompson*, 103 Wn.2d 292, 294-295, 692 P.2d 807 (1984). Before this Court is the request to vigilantly protect and check the actions of the elected official charged with the regulatory and program responsibilities for elections and ensure that he complies with the constitution and mandates imposed by the legislature. To do so, this Court must inquire whether the proper procedures have been followed in order to

invoke the initiative process so that procedural defects do not compromise the initiative right. *See id.* at 298. Neither the Secretary of State nor Interveners dispute that I-1029 petitions fail to contain the statutory form and language for a petition to the people, nor can the Secretary of State and Interveners dispute I-1029 petitions substantially contain the language for a petition to the legislature. Yet, the Secretary of State refuses to direct I-1029 to the legislature. This is not a case where voters are being disenfranchised, as the Secretary of State has publicly claimed. Rather, this is a case where the voters' franchise is being diverted by the Secretary of State to a different initiative process despite the voters' directives.

It is anticipated that the Secretary of State and Interveners will assert that voters who signed I-1029 petitions were presumably not misled by the petitions' plain language. In essence, the Secretary of State asks this Court to condone his unilateral revision of the format and directives of the I-1029 petitions after circulation of those petitions to the voters. As this Court opined in *Coppernoll*, "[d]oing so would raise obvious questions whether the newly-edited initiative remains true to the intent of those who signed the proposed initiative to qualify it for certification to the legislature." This Court should not edit and revise I-1029's petitions or make assumptions regarding the understanding or intent of the voters who signed the petitions. Presuming signers did not read the petitions or

did not care what type of initiative process they were directing is not warranted. One could easily make the opposite presumption.[12]

The difficulty of surmising with any confidence or accuracy that the petition-signers would have approved a different version of the initiative from the one presented to them was addressed in *Convention Center Referendum Committee v. District of Columbia Board of Elections*, 441 A.2d 889 (1981) (plurality opinion). The court addressed a sponsor's attempt to unilaterally change initiative petitions after those petitions had been circulated. The sponsor had attempted to sustain its initiative effort by matching signatures from petitions for a measure that had been judicially declared outside the scope of the initiative power to a second initiative bill that conformed with the court's directives. The court rejected this attempt as an illegal, unilateral revision of the substance of an

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[12] *See* Editorial, *I-1029: What It Said Vs. What They Said It Said*, The News Tribune, July 17, 2008, which asks: "Are Washingtonians smart? Or are they dumb? Some might have doubts about their collective intelligence, but the state constitution presumes they are smart enough to enact laws through the initiative process." The editorial goes on to note that "the petitions didn't identify I-1029 as a direct-to-ballot initiative. They identified it as an initiative to the Legislature. It's there in black and white, right in the middle of the sheets, in the concise description: The measure is to be 'transmitted to the Legislature' of the State of Washington at its next ensuing regular session . . . Initiatives to the people and initiatives to the Legislature are very different animals." The editorial notes the Secretary's argument that sending I-1029 directly to the electorate honors the intent of the citizens who signed it, but questions the presumption about intent: "Honoring the intent of citizens is, of course, a good thing. But that argument assumes that all of the roughly 300,000 citizens who signed it failed to read what they were signing. Why not assume that at least some did read it – perhaps enough of them that the initiative otherwise wouldn't have qualified? It's easy to imagine someone signing an initiative to the Legislature when he or she would have rejected the same measure as an initiative to the people. Initiatives to the Legislature get vetted. They get hearings, and lawmakers hear arguments pro and con. If they spot a serious major flaw, they can propose a fix with a ballot alternative."

initiative bill. The court declined to allow revision of a bill after circulation, even upon the request of the proposer, noting it "would be mischievous to read into the Charter Amendments and the Initiative Procedures Act a proposer's right to change the terms of a measure between circulation of petitions and submission to the voters." *Id.* at 901. The court's reasoning is applicable here:

> In most circumstances neither the proposer, the Board, nor the court could surmise with any confidence or accuracy that the petition-signers would have approved a different version of the initiative from the one summarized on the petitions.
>
> Nor will it do to say that the electorate, in eventually voting on the initiative, could 'cure' any error in perceiving the petition-signers' intent. If the role of the petition-signers is to have meaning in the initiative process, the bill they signed to support, in contrast with one materially rewritten or redefined to meet a statutory or constitutional objection, must be the bill put to the voters, if one is put to the voters at all. Although our refusal to allow material alteration of a bill may lead to a harsh result for those who, in good faith, circulated petitions containing a bill that, in the end, cannot reach the ballot, it would be an even harsher result for the governmental process itself if we were to permit an initiative onto the ballot based on signatures which might not have been given for a materially altered bill. We must be able to say with conviction, based on the express terms of the initiative, what the petition-signers contemplated as acceptable.

Id. (footnote omitted).

Similarly, the South Dakota Supreme Court in *Nist v. Herseth*, 270 N.W. 2d 565 (1978), reviewed whether a writ of prohibition should issue to restrain certification of a measure for a vote at the next general election

due to insufficient signatures, improper circulation, improper notarization, improper petition forms, and defective signatures. The court reviewed each of these challenges to the initiative petitions and rejected all that had deficiencies that were "substantial in character and not merely requirements of form." *Id.* at 570. In making determinations, the court held:

> Implicit in the holding that these statutory requirements are 'substantial in character' is the thought that they are important and essential elements of the law giving effect to the constitutional provision relating to the initiative and referendum. Considered in their entirety these requirements are to prevent fraud or corruption in securing the petitions.
>
> . . . .
>
> If effect is to be given to the constitutional provision it is clear that safeguards must be established to prevent fraud and corruption in securing the petitions. In this connection it is essential, we believe, that the petitions disclose information which will readily permit anyone to check the petitions and determine if the signers are qualified.

Id. at 570-571 (internal quotations and citations omitted). The court noted the requirements are not difficult to fulfill, as witnessed by the thousands of petitioners who had met even more stringent requirements in the past.

As in *Nist*, the requirements imposed by RCW 29A.72.110 are to provide disclosure and safeguard against corruption. These requirements are not difficult to meet – indeed numerous petitioners have done so. *See* ASF, pp. 4-5, ¶10, Exhibit K. Fortunately, the sponsor's and proponents' alleged defects do not defeat the initiative process or disenfranchise voters

who signed the petitions. I-1029 can be directed to the legislature, exactly as the petitions plainly state. Thus, the right of initiative is facilitated by simply directing I-1029 to the legislature in accordance with the petition's plain language. *See Coppernoll* at 297.

Nor can the voters by eventually voting on I-1029 cure procedural errors or errors in perceiving the petition-signer's intent. *See Convention Center Referendum Committee* at 901. If the role of the petition-signers is to have any meaning in the initiative process, the measure that they sign and the directive as to where that measure is to be decided must be recognized and followed. *Id.* The Secretary of State's "exercise of discretion" would materially alter the I-1029 petitions by ignoring the plain language the voters read and presumably understood.

Additionally, those seeking to exercise the right of initiative must, as a condition precedent, comply with the conditions prescribed. *See Wyoming In-Stream Flow Committee v. Secretary of State of Wyoming*, 651 P.2d 778, 785-786 (1982):

> We consider and hold that the specific statutory review requirements placed on the Secretary show an intent on the part of the legislature that those seeking to exercise the right of initiative in this state must, as a condition precedent, comply with the conditions prescribed.

The I-1029 sponsor and proponents simply failed to meet their burden. The Secretary of State cannot inject himself into the process and pick up that burden under the guise of discretion.

D. *Schrempp v. Munro* Supports Review Based on the Text of the Initiative Petition and Does Not Establish a Rule of Absolute Discretion

The Secretary of State relies on *Schrempp v. Munro*, 116 Wn.2d 929, 809 P.2d 1381 (1991) to support his actions. But *Schrempp v. Munro* does not establish a rule of absolute discretion. Rather, that case addressed a situation where the Court looked to the face of the petition, considered the petition as a whole, and concluded there was a basis for the Secretary's decision that the petition substantially complied with the statutory form. The Secretary misses the mark when he contends *Schrempp* supports his decision to totally disregard the face of the petition and the essential requirement that the petition state the nature of the initiative.

The legal and factual dissimilarities between this case and *Schrempp* are clear. In *Schrempp,* the Secretary, the initiative proponents, and the Court all emphasized the language on the face of the petition, and evaluated whether, considering the petition as a whole, it substantially complied with the statutory form. There, the Secretary asked the Court to consider all of the language on the face the petition and argued "this petition does substantially comply with the statutory form." Washington 116 2nd Briefs, Vol. 12, at 10. He emphasized that the petition for an initiative to the legislature correctly stated above the signature lines WASHINGTON VOTERS SIGN BELOW TO SUBMIT INITIATIVE 120 TO THE LEGISLATURE IN 1991. In other places, he noted, the petition advised potential signers "200,000 signatures are needed to place

Initiative 120 before the Legislature." The Secretary described the decision as one "to ignore a formal but minor defect." *Id.* at 23. The proponents of the initiative likewise noted:

> Of seven references on the face of the petition to whom the measure will be submitted, six mention or refer to the legislature.
>
> The petition also states clearly:
>
> We the undersigned citizens and legal voters of the State of Washington, respectfully direct that this petition and the proposed measure known as Initiative Measure No. 120 . . . be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law and each of us for himself or herself says: . . .
>
> The one small reference to submitting the petition to the people placed just before the text cited above could not have created any substantial confusion or mistake. A reasonable person reading "Initiative Petition for Submission to the People" in context would conclude that the people were being asked to sign the petition for submission to the legislature.

Washington 116 2nd Briefs, Vol. 12, Motion to Dismiss Appeal and Brief for Respondents Lee Minto at 32.

It was in this context that the Supreme Court ruled that the Secretary of State had properly exercised discretion to accept and file the initiative petitions. The Court described in some detail the petitions, focusing on the fact that the operative words of the petition and the

language above the signature lines correctly said the petition was for an initiative to the legislature:

> Also on the front of the petitions there appear the operative words of the petition, i.e., that it is addressed to the Secretary of State and that the undersigned citizens and legal voters direct that the proposed measure "be transmitted *to the legislature*" and that the signers "petition the *legislature* to enact said proposed measure into law." (Emphasis ours.) In a box headed "NOTE" it states that "200,000 signatures are needed to place Initiative 120 *before the Legislature*." (Emphasis ours.) Above the lines on which voters sign, there appears in capital letters: "WASHINGTON STATE VOTERS SIGN BELOW TO SUBMIT INITIATIVE 120 TO THE LEGISLATURE IN 1991."

Schrempp v. Munro, 116 Wn.2d at 933 (emphasis in original). The Court determined the Secretary of State was not acting contrary to law, and his decision was pursuant to his discretionary authority, when "[t]he petitions contained one erroneous phrase, 'to the people,' but the operative paragraph twice declared that it was an initiative to the Legislature, and the large print immediately above the signature lines stated: 'WASHINGTON STATE VOTERS SIGN BELOW TO SUBMIT INITIATIVE 120 TO THE LEGISLATURE IN 1991.'" *Id.* at 938.

A claim that the Secretary has the discretion to send a measure to the ballot when the petitions proposing the measure were demonstrably NOT substantially in the form required by RCW 29A.72.120 and NOWHERE states it is an initiative to the people is not supported by the

Court's decision in *Schrempp*. *Schrempp* does not support total disregard of the language on the petition.

V. CONCLUSION

This Court should require the Secretary of State Reed to accept the I-1029 petition as an initiative to the legislature, to certify the results of his verification and canvass of the signatures to the legislature within forty days of the filing, to transmit a certified copy of the proposed measure to the legislature at the opening of its 2009 session, and to refrain from certifying I-1029 as an initiative to the people to each county auditor to be voted upon at the November 2008 general election.

Respectfully submitted this 11th day of August, 2008.

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